

## **Motion for *Nebbia* Hearing to Determine the Source of Bond Monies**

The court should require the defendant to show a legitimate source for any bond posted.

The State requests that before this Court accepts any money or property posted on behalf of the defendant, this Court hold a hearing to allow the defendant an opportunity to show that the money or property posted for his bond comes from a legitimate source.

The primary purpose of an appearance bond is to secure an accused person's appearance in court. *State v. Nunez*, 173 Ariz. 524, 526, 844 P.2d 1174, 1176 (App. 1992). The Court may impose such a bond pursuant to Rule 7.3(b)(5), Arizona Rules of Criminal Procedure.<sup>1</sup> The underlying assumption in requiring such a bond is that the property posted as security is of such value to the accused that, rather than losing the property by failing to appear in court, the accused will instead appear in court and keep the property, even though he must also face the consequences of going to court. If, however, the defendant has no right or title to the property posted, then losing the property will be of no consequence to him, and having posted it will provide no security for the defendant's appearance in court. A defendant has no right to illegally-acquired property. Thus, posting bond with illegally-acquired property provides no security for the defendant's appearance.

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<sup>1</sup> That subsection provides:

Additional Conditions. An order of release may include the first one or more of the following conditions reasonably necessary to secure a person's appearance:

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(5) Execution of a secured appearance bond . . . .

In *United States v. Nebbia*, 357 F.2d 303, 304 (2nd Cir. 1966), the Second Circuit Court of Appeals held that the trial court had the right to inquire as to the source of funds posted for bail. The purpose of the inquiry was to assure the court that the person posting the bond had sufficient interest in the funds to ensure the defendant's presence. "It is not the sum of the bail bond that society asks for, but rather the presence of the defendant." *Nebbia*, 357 F.2d at 304, quoting *Concord Casualty & Surety Co. v. United States*, 69 F.2d 78, 81, 91 A.L.R. 885 (1934). In *United States v. Noriaga-Sarabia*, 116 F.3d 417, 420 (9th Cir. 1997), the Ninth Circuit stated that "sureties must reveal their property resources . . . so that the court can be satisfied that they have an incentive and purpose to secure the defendant's presence at trial." *Id.*, quoting *United States v. Skipper*, 633 F.2d 1177, 1180 (5th Cir. 1981). Similarly, in *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985), the First Circuit reviewed 18 U.S.C. § 3142, the Federal Bail Reform Act, and its rebuttable presentation that drug offenders pose a special flight risk. The *Jessup* Court noted that when a defendant posts the proceeds of a crime as bond, the rationale underlying the bond is vitiated. *Id.* at 385. Finally, in *United States v. \$100,000*, 602 F. Supp. 712 (S.D.N.Y. 1985) a forfeiture case, the District Court held a hearing pursuant to *Nebbia*, *supra*, to determine the source of a \$100,000 bail posted in the form of a certificate of deposit (CD). The defendant claimed she won the money in a Puerto Rican lottery. The Court found that explanation incredible and refused to accept the CD as bond. As in *Nebbia*, the defendant in this case should not be permitted to work a fraud on the Court by using the proceeds of crime to secure his release pending trial. This Court has the inherent authority to protect the integrity of its orders by inquiring into the source of funds provided as bond. The State, therefore, requests the

Court hold a hearing to determine whether the source of any bond posted by the defendant is legitimate and, therefore, true security for his appearance.